(4)

No. 06-359

FILED
OCT 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DAVIESS COUNTY, KENTUCKY,
Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN RESPONSE

DAVID BIDERMAN
General Counsel
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
4301 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20008
(202) 364-3743

AMY D. CUBBAGE
Counsel of Record
DENNIS J. CONNIFF
FROST BROWN TODD LLC
400 WEST MARKET STREET
32ND FLOOR
LOUISVILLE, KY 40202-3363
(502) 589-5400

Counsel for Respondent, National Solid Wastes Management Association

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTERSTATEMENT OF THE QUESTION PRESENTED

This Court definitively ruled in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), that local ordinances directing solid waste to a preferred processing facility - known as flow control ordinances - are facially discriminatory against interstate commerce and are thus *per se* violations of the dormant Commerce Clause. In light of that clear, unambiguous holding, the Sixth Circuit Court of Appeals struck down an ordnance enacted by Daviess County which directed all municipal solid waste generated within its borders to its own transfer station and landfill. This case presents one question, which is already the subject of a Petition for Certiorari granted during this term:

Whether the *per se* rule announced in *Carbone* applies when the preferred processing facility is publicly owned.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent National Solid Wastes Management Association is an unincorporated association and has no stock. It is a subsidiary of the Environmental Industry Associations, a non-profit corporation incorporated in Illinois with its principal place of business in Washington, D.C. Therefore, no parent or publicly-held company holds 10% or more of National Solid Waste Management Association's stock.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF REASONS TO HOLD THE PETITION 1

STATEMENT OF THE CASE 1

A. The Ordinance at Issue 1

B. Rationales Asserted in Support of the Ordinance 2

C. Effect of the Ordinance on NSWMA 4

D. Proceedings Below 4

REASONS FOR HOLDING THE PETITION 5

I. The Court has already accepted the issues presented in this case for review 5

II. The Sixth Circuit's decision was correct 6

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) . . . . . *passim*

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 9

United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority,
261 F.3d 245 (2d Cir. 2001) . . . . . *passim*

United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority, et al.,
438 F.3d 150, *cert. granted*, 2006 U.S. Lexis 5414
(U.S. Sept. 26, 2006) (No. 05-1345) 1, 5, 7

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Commerce Clause, Art. I, § 8, cl. 3 4

Ky. Const. § 164 4

Ky. Rev. Stat. § 224.43-315 . . . . . 2, 3, 4

Ky. Rev. Stat. § 224.43-315(1), *et. seq.* 2, 3

BRIEF IN RESPONSE

SUMMARY OF REASONS TO HOLD THE PETITION

This Court recently granted a Petition for a Writ of Certiorari to the Second Circuit Court of Appeals in the case of *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, docket number 05-1345. The *United Haulers* case presents the same question for review as this case—whether this Court's well-reasoned opinion in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), in which this Court determined that restrictions on the flow of waste in interstate commerce through the use of "flow control" laws and ordinances facially discriminate against interstate commerce and are thus *per se* unconstitutional under the dormant Commerce Clause, applies with equal force to publicly-owned facilities. The Second Circuit invented an exception from *Carbone* for beneficiaries of flow control laws and ordinances which are publicly owned, a distinction called "surprising" and rejected by the Sixth Circuit in this case. Because this Court has already accepted the question presented for review this term, and the Sixth Circuit's opinion is consistent with *Carbone*, this Court should hold Daviess County's petition pending its resolution of *United Haulers*.

STATEMENT OF THE CASE

A. The Ordinance at Issue.

The Daviess County Fiscal Court enacted the Ordinance at issue in this case on February 19, 2004:

> 1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its

> jurisdiction through the grant of nonexclusive franchises.
>
> 2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.
>
> 3. Nonexclusive franchises shall be granted to all haulers that are properly registered in accordance with [Ky. Rev. Stat. §] 224.43-315(2), have properly filed an annual report as required by [Ky. Rev. Stat. §] 224.43-315, and are in compliance with all other applicable laws and regulations.
>
> 4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted a franchise by Daviess County Fiscal Court.

Pet. App. 2a-3a. The Ordinance requires all registered haulers of waste in Daviess County to dispose of all municipal solid waste collected within the County at the County-owned landfill or transfer station. *Id.* Fiscal Court first obtained a permit for its county-owned landfill in 1994. It is the only permitted landfill within the borders of Daviess County. Pet. at 5.

B. Rationales Asserted in Support of the Ordinance.

Daviess County has consistently asserted two rationales in support of the Ordinance throughout this case: (1) its authority under Ky. Rev. Stat. § 224.43-315; and (2) its desire to ensure that the cost of disposal of solid waste in Daviess County remains low. Pet. at 5-6; Pet. Supp. App.

18a-19a. Ky. Rev. Stat. § 224.43-315, the first rationale, requires all Kentucky counties to provide a universal collection system for all municipal solid waste generated within the county, Ky. Rev. Stat. § 224.43-315(1), and requires haulers of municipal solid waste to register with counties and submit annual reports detailing solid waste collection activities to both the counties in which they are registered and the Kentucky Environmental and Public Protection Cabinet. Ky. Rev. Stat. § 224.43-315(2)-(4).[1] Notably, Ky. Rev. Stat. § 224.43-315 does not require a county to provide collection or disposal services itself. A county may fulfill its obligations under Ky. Rev. Stat. § 224.43-315(1) by entering into contracts or franchises with private companies. The second rationale, a so-called desire to keep disposal costs low – ironically by eliminating competition – is not related to any of Daviess County's legal duties. Rather, it is pure economic protectionism for Daviess County's landfill and transfer station. The Ordinance allegedly keeps disposal costs low by guaranteeing a flow of solid waste into the facility—a goal achieved through the sheer exercise of Daviess County's regulatory power.

In addition to explicitly invoking Ky. Rev. Stat. § 224.43-315 in the text of the Ordinance and asserting its interests in economic protectionism, Daviess County has also repeatedly invoked a number of other Kentucky statutes relating to counties' powers and duties to regulate solid waste. Pet. at 4-5. Though each of these statutes touches on both state and county waste management authority, each statute has distinct and separate aims. Neither support a need or state a policy determination by the General Assembly that Kentucky-

[1] NSWMA did not challenge the registration provision in Ky. Rev. Stat. § 224.43-315(2)-(4) or in the Ordinance.

generated waste should be disposed of in its county of origin, a publicly-owned facility, or even in a Kentucky landfill.

C. Effect of the Ordinance on NSWMA.

NSWMA is a non-profit trade association with its primary place of business in Washington, D.C. Pet. App. 3a. NSWMA has members in all fifty states, including Republic Services of Kentucky, LLC ("Republic"). Republic is engaged in the solid waste management business in Daviess County and has duly registered with the County pursuant to Ky. Rev. Stat. § 224.43-315 and the Ordinance.[2] *Id.*

D. Proceedings Below.

NSWMA filed its Complaint for declaratory and injunctive relief against Daviess County on March 25, 2004. Pet. App. 1a. NSWMA alleged that the Ordinance violated the dormant Commerce Clause, Art. I, § 8, cl. 3 of the U.S. Constitution, on its face because it restricted the flow of a commodity, municipal solid waste, in interstate commerce, in direct contravention of this Court's opinion in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). Ct. App. JA 7-11. Daviess County filed an Answer and Counterclaim seeking a judgment declaring that the Ordinance was constitutional under the dormant Commerce Clause, asserting *inter alia* that it should be afforded the exception from *Carbone* for publicly-owned facilities created by the Second Circuit Court of Appeals in *United Haulers*

---

[2] Though the Ordinance speaks in terms of non-exclusive "franchises," this term is technically incorrect under Kentucky law since Ky. Const. § 164 subjects franchises to public advertisement and bidding. The registrations can be considered no more than licenses to do business in Daviess County.

Association v. Oneida-Herkimer Solid Waste Management Authority, 261 F.3d 245 (2d Cir. 2001). Ct. App. JA 16-28.

The parties filed simultaneous motions for summary judgment on their respective requests for declaratory, and in the case of NSWMA, injunctive, relief. Pet. App. 2a. The District Court entered a Memorandum Opinion and Order on November 19, 2004. *Id.* In its Opinion, the District Court held that the Ordinance discriminated against interstate commerce on its face and thus violated the dormant Commerce Clause. Pet. Supp. App. 18a. The District Court also declined to apply the exception from *Carbone* for publicly-owned facilities in *United Haulers*. Pet. Supp. App. 8a-12a. The District Court entered a judgment permanently enjoining enforcement of the Ordinance. Pet. Supp. App. 20a.

Daviess County appealed the judgment of the District Court to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the District Court in all respects, including its rejection of the Second Circuit's rationale in *United Haulers*. Pet. App. 20a-26a.

REASONS FOR HOLDING THE PETITION

I. The Court has already accepted the issues presented in this case for review.

This Court granted certiorari in the case of *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, docket number 05-1345, on September 26, 2006. The Sixth Circuit Court of Appeals' opinion in this case is in direct conflict with the Second Circuit's opinion in *United Haulers* over the proper interpretation of this Court's opinion in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383

(1994), as applied to flow control laws benefiting publicly-owned waste processing facilities. Given that this Court has already accepted the *United Haulers* case for review, and, as stated more fully below, the Sixth Circuit's opinion in this case sets forth the proper application of *Carbone* to the facts presented in these cases, it is not necessary for the Court to grant Daviess County's Petition for a Writ of Certiorari at this time. This Court should hold Daviess County's Petition pending resolution of the question presented in *United Haulers*.

II. The Sixth Circuit's decision was correct.

In holding that Daviess County's attempt to discriminate against interstate commerce through the use of a classic flow control ordinance was foreclosed by the dormant Commerce Clause, the Sixth Circuit Court of Appeals relied on this Court's opinion in *Carbone*. The Sixth Circuit's straightforward, common sense application of *Carbone* is undoubtedly correct and unassailable. In contrast, the Second Circuit undercut the clear rationale of *Carbone* when it invented the exception for publicly-owned facilities in *United Haulers*. There is therefore no reason to grant Daviess County's Petition, and this Court can hold its petition while it resolves the question presented in *United Haulers*.

This Court directly applied well-settled traditional dormant Commerce Clause analysis to so-called "flow control" laws in 1994 in *Carbone*. A flow control law is a restriction imposed by a state or subdivision of a state intended to direct its waste to a favored processing or disposal facility.[3] The

[3] *Amici* have requested to file a study analyzing a report by National Economic Research Associates concerning the economic effects of flow control. The very National Economic Research Associates

purpose of directing waste in this way is generally to generate revenue sufficient to retire debt associated with constructing a public facility or to create a sufficient flow of waste to otherwise ensure the economic viability of the disposal facility. *Id.* at 389 ("to ensure that the town-sponsored facility will be profitable"). Clarkstown instituted what it clearly thought was an ingenious scheme when, after closing its town dump, it arranged for a local contractor to build a transfer station. The contract providing for the construction allowed Clarkstown to purchase the facility after five years for one dollar. In order to ensure that this arrangement was economically feasible for the contractor, Clarkstown entered into an agreement with the contractor to provide for a minimum fee for disposal of waste at the transfer station, and enacted an ordinance requiring all waste generated within Clarkstown to be disposed of at the transfer facility. *Id.* at 387.

Carbone, a local recycler, argued that the flow control ordinance impaired its ability to compete in interstate commerce. This Court agreed and declared that the flow

---

report cited throughout the study proffered by *Amici* demonstrates that flow control increases disposal costs. Regardless of any municipality's alleged "need" for flow control, all such entities must comply with the requirements of the dormant Commerce Clause. If flow control is necessary as a policy matter, Congress must make that determination and enact legislation authorizing it. To date, Congress has passed no law overruling the effect of *Carbone* and allowing local governments to burden interstate commerce in this manner, even though a number of such bills have been proposed. Brief of *Amici Curiae* American Trucking Associations, Inc. and National Solid Wastes Management Association in Support of the Petitioners at 4 and n.3, *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 05-1345 (certiorari granted September 26, 2006).

control ordinance discriminated against interstate commerce on its face, in violation of the dormant Commerce Clause:

> The real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce. For this inquiry, our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce, *Philadelphia*, 437 U.S., at 624; and second, whether the ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test.

Id. at 389-90. Since the flow control ordinance discriminated against interstate commerce on its face, there was no need to discuss whether there were any putative local benefits—the ordinance was *per se* unconstitutional.

Daviess County invited the courts below to ignore the holdings of this Court in *Carbone* and to adopt the unfounded exception to *Carbone* invented by the Second Circuit Court of Appeals in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001), for discriminatory restrictions on interstate commerce favoring publicly-owned facilities. The Sixth Circuit properly rejected this invitation, finding that *United Haulers* was inconsistent with the rationale underlying this Court's holding in *Carbone*.

United Haulers involves a challenge by a group of private haulers to a flow control regulation similar to that enacted by Daviess County. Two upstate New York counties created a

multi-county solid waste management authority and constructed six solid waste management facilities, including a transfer station and two landfills. Those counties then adopted flow control ordinances directing that all solid waste generated within the solid waste management authority be disposed of at one of the authority's six facilities. *United Haulers*, 261 F.3d at 249-51. The only factual difference between *United Haulers* and *Carbone* was the New York facilities at issue in *United Haulers* were already publicly owned, whereas the facility in *Carbone* was owned by a contractor, but with an agreement to allow the municipality purchase the facility after five years for a dollar.

The district court ruled the flow control laws constituted *per se* violations of the dormant Commerce Clause and enjoined enforcement of the scheme, *see id.*, but the Second Circuit reversed. The Second Circuit concluded that a flow control ordinance does not discriminate against interstate commerce, even under *Carbone*, when the ordinance favors a local interest that is publicly-owned, ostensibly carving out an exception for flow control ordinances aimed at publicly-owned facilities. *See id.* at 257-64. The Second Circuit then remanded the case to the district court for a determination of whether the ordinance violated the balancing test for restrictions which do not discriminate against interstate commerce on their face set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See id.* at 264. Both the district court and Second Circuit determined that the ordinance did not violate the *Pike* balancing test. This Court has now accepted certiorari on the question of whether the Second Circuit correctly applied *Carbone* to the challenged ordinance.

In reaching this holding, the Second Circuit dissected *Carbone* and determined – based almost exclusively on

language in the dissent, not the majority opinion – that the operative fact in *Carbone* was the fact that the flow control ordinance enacted by the Town of Clarkstown directed the town's waste to a privately-owned facility,[4] not solely that the facility in Clarkstown was local and was benefiting at the expense of other actors in interstate commerce. *See id.* at 257-60.

The District Court refused to adopt the *United Haulers* rationale in this case:

> The Court does not agree that the Carbone decision turned on whether the facility was public or private. The minority criticized the majority for ignoring the fact that no benefit was bestowed on local private actors as a result of the flow control ordinance. They pointed out to the majority that the ordinance simply aided the government in satisfying a traditional government responsibility. Instead of being divided over whether the facility was public or private, it seems it simply did not matter to the majority that they (sic) facility was public.
>
> The majority in Carbone focused instead on the effect of the flow control ordinance—that it hoarded solid waste, and the demand to get rid of it, for the benefit of the single local proprietor. The majority found that

[4] This analysis ignores the immense public stake in the waste disposal facility at issue in *Carbone*. That facility was built at the request of the municipality and the municipality had guaranteed a minimum flow of waste to the facility in order to ensure that the cost of constructing the facility was paid off within five years so that the town could purchase the facility for a dollar. Thus, the facility would have been publicly owned within a short period of time. *See Carbone*, 511 U.S. at 387, 412.

> such a restriction discriminated against the stream of commerce, as "it allows only the favored operator to process waste that is within the limits of the town." Id. at 391. Because the movement of the waste was curtailed, the ordinance was per se discriminatory. Id.

Pet. Supp. App. 9a-10a.

Likewise, the Sixth Circuit rejected *United Haulers*, calling it "surprising." Pet. App. 20a. The Sixth Circuit criticized the Second Circuit's reliance on language in the dissent drawing a distinction between public and private ownership, noting that "[f]or every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition." Pet. App. 22a. The Sixth Circuit focused on the true purpose of the dormant Commerce Clause, as elucidated in *Carbone*:

> In further support that the focus of the dormant Commerce Clause inquiry was on the economic harm to out-of-state actors and the local market, the Court stated, "The essential vice in laws of this sort is that they bar the import of the processing service." [*Carbone*, 511 U.S.] at 392 (emphasis supplied). In other words, the crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefited by the ordinance is publicly owned.

Pet. App. 22a. The Sixth Circuit went on to note that not even the dissent in *Carbone* accepted the public-private distinction, even though "it had every incentive to do so." Pet. App. 24a. The Sixth Circuit concluded by holding that the public ownership of its transfer station and landfill does

not "cloak [Daviess County's] facially protectionist activity from the appropriate scrutiny under the Commerce Clause." Pet. App. 26a.

The single unifying strand in the majority opinion in *Carbone* is the focus on the local nature of the favored interest, not its status as either privately- or publicly-owned. "Local" is not the same as "private." The Second Circuit missed the *Carbone* majority's point, which is the local nature of the favored facility, not whether it is privately-owned. As the Sixth Circuit noted, it makes no difference that Daviess County owns the transfer station and landfill benefiting from its flow control ordinance—the effect on the market is the same whether Daviess County owns the facility or not. It creates an unfair monopoly.

The well-reasoned decision of the Sixth Circuit Court of Appeals is in accord with this Court's decision in *Carbone*, and should not be disturbed. The Second Circuit's decision, on the other hand, is not supported by *Carbone* and can now be corrected by this Court. The Petition for a Writ of Certiorari should be held while this Court resolves the question presented in *United Haulers*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be held.

Respectfully submitted,

Amy D. Cubbage
Counsel of Record
Dennis J. Conniff
Frost Brown Todd LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
(502) 589-5400

David Biderman
General Counsel
National Solid Wastes Management Association
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 364-3743

Counsel for Respondent, National Solid Wastes Management Association

Dated: October 13, 2006